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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

—
No. 1138.
—

JACK HENSLEY, *Petitioner*,

v.

THE UNITED STATES OF AMERICA.

—
**PETITION FOR REHEARING UNDER REVISED
RULE 33 OF THIS AMENDED PETITION FOR
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUM-
BIA, TO PROVIDE PETITIONER FULL ASSIST-
ANCE OF COUNSEL REQUIRED IN THIS CRIM-
INAL CAUSE BY THE SIXTH AMENDMENT.**

—
**AND INVITATION TO HON. SOLICITOR GENERAL TO
CONSIDER CONFESSION OF SPECIFIC ERROR
HEREIN INDICATED.**

—
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**AND INVITATION TO HON. SOLICITOR GENERAL TO
CONSIDER CONFESSION OF SPECIFIC ERROR
HEREIN INDICATED.**

1. The petitioner, Jack Hensley, prays that he be afforded full assistance of counsel in this criminal cause (6th Amdt.) by the granting of this petition for rehearing under the Revised Rule 33, of this amended petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia which amended petition corrects substantial prejudicial matters

inadvertently appearing in the original due to the serious illness of the petitioner's present counsel from which he is recovering slowly due to his age of 75 (whose appearance was filed in the Court below but hence not on the brief nor earlier herein (R. 64)); the judgment affirmed petitioner's conviction for unlawful possession of marihuana under the Marihuana Tax Act of 1937, as re-enacted in the Internal Revenue Code, 26 U. S. C. A. 2591, 2593.

OPINION BELOW.

2. The opinion herein of the Court below is as yet unreported but appears in full in R. 64.

JURISDICTION.

3. The judgment of the Court of Appeals was entered February 10, 1942 (R. 66), and a petition for rehearing (R. 67-69) was denied February 19, 1947 (R. 69). The petition for a writ of certiorari was filed March 18, 1947 and denied April 5, 1947; this petition being filed pursuant to Rule 33, under which, and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935); also Rules 37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

4. The statutes involved in the deprivation of (a) appellant's liberty without due process of law, and his deprivation of the equal protection of the law, and; (b) appellant being compelled directly and indirectly in this criminal cause to be a witness against himself; and (c) by the usurpation of the federal authorities of powers not delegated to the United States by the Constitution, nor prohibited by it to the States, and which consequently are reserved to the States respectfully, or to the people, in the accomplishment of said deprivation (a); and (d) and the constitutionality of the statutes involved herein which purport to authorize the herein complained of deprivations, is

considerately challenged as a whole, as well as upon several particular circumstances prejudicial to the public interests, and appellant's private rights; which violations (a) violates appellant's rights and privileges under the 5th and 6th amdts.; (b) violations substantially impaired appellant's rights under the 4th and 5th Amdts., in which Boyd U. S. 116, U. S. 616, 618, widely cited and approved, sustained appellant's such contention; (c) discloses the violation of the 10th Amdt. to the substantial prejudice of the public and the appellant's private rights, including (e) being compelled to create, and contribute to the creation, of written and corroborating evidence of possible criminal liability at any time or in essential steps, and required by the statutes involved herein to be compelled to obtain a stated order form before appellant or any one may lawfully gather a volunteer product of our soil because such gathering requires severance from the soil of the volunteer growing marihuana; which severance comes within the term "transferee", (the evidence herein not definitely showing any otherwise acquirements of appellant); and (f) the statutes herein involved clearly violate the 10th Amdt. by requiring the exercise of federal power, enforced by crimes prosecution, to take property for public use without just compensation, in violation of the 5th Amdt.; (g) appellant's arrest and unreasonable search of his house, and unlawful and unreasonable seizure of his said property in violation of the 4th Amdt., in lieu of the just compensation for the taking (f) of his private property prohibited by the 5th Amdt., with this serious protracted prosecution of appellant, comprises violation of 8th Amdt., "cruel and unusual punishment inflicted", upon appellant by and incident to the exercise by the Federal Government of powers prohibited to the Federal Government by the Constitution which vests such powers "in the States respectfully, or to the people" (10th Amdt.), which exercise by the Federal Government is in violation of appellant's rights under the 8th and 10th Amdts.; and (h) since only a relatively few of our citizens may obtain "order form", is

not the statutes involved herein class legislation by Congress without power to enter and control territory and its growth violative of the prohibition against class legislation as well as in violation of the 10th Amdt.; any such exercise being unlawful and arbitrarily inherent may be ruthlessly exercised typical to the control of soil production with the ultimate liability of regimenting producers of the soil of our States by will of Congress, or any other power beyond the direct control of our States, of their respective soils and production.

**INVITATION TO THE HONORABLE SOLICITOR
GENERAL TO CONSIDER THE CONFESSION AT
LEAST OF SPECIFIC ERROR HEREIN.**

5. Under the authority of *Young v. United States*, 315 U. S. 257, 258-9, 62 S. Ct. 510, 511 86 L.ed 832, 834 the Honorable Solicitor General is hereby considerably invited to consider the confession at least of the specific error herein which is indicated in this petition for rehearing. Such consideration, in view of said authority, is deemed to comprise an element of due process of law under the provision of the Fifth Amendment.

STATUTES INVOLVED.

6. The Marihuana Tax Act of 1937, as re-enacted in the Internal Revenue Code, 26 U. S. C. A. provides in pertinent part:

2591. Order forms.

(a) General Requirement. It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred on a form to be issued in blank for that purpose by the Secretary.

• • • • • 1 • • •

2593. Unlawful possession.

(a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

STATEMENT.

7. Marihuana is a volunteer growth of our soil in the environment of Washington, D. C. as well as in many of our States. It may fairly be said that such was the limited supply of appellant, since the evidence discloses no other source of his supply.

The Department of Agriculture formerly published pamphlets on marihuana's volunteer and other growths, but the Narcotic Bureau of the Federal Treasury Department sometime ago coerced such agriculture authorities to desist making such pamphlets publicly available.

The repeal of our Constitutional Amendment against intoxicating liquor as a beverage is a substantial indication against the practice of law enforcement of human restrictions; but we need not in this cause enter such realm except to consider that such enforcement had the backing of a constitutional amendment to support the same, while marihuana law enforcement by Federal authority is so lawless, arbitrary and reckless that it apparently forgets our federal Constitution and its age old safeguards of the rights of our people; and seems to hark back to the dark ages when all books of learning were forbidden to the people, and only opened for limited times under the clank

of its securing chains and locks to limited public inspection at a few ceremonies in which the glint and glitter of arms and jewels mingled with knightly plumes and gorgeous costumes.

**EXCEPTIONAL REASONS FOR GRANTING THIS
REHEARING WRIT PRESENTING SOLELY CON-
STITUTIONAL GROUNDS OTHER THAN DOUBLE
JEOPARDY.**

8. The exceptional reasons comprise the serious illness of his present aged counsel approaching at the time of the entrance of his appearance in this cause in the Court below, and not abating to the extent that his physician would permit his performance of the necessary professional work herein until after the time of the filing herein of the petition for the writ of certiorari.

These reasons appear concisely stated in paragraph 4 hereof under the heading, "Questions Presented".

A. The initial authority presented hereunder is *Boyd v. United States*, 116, U. S. 616, 618 (6 S. Ct. 524, 29 L. ed. 46). This authority involves a quite similar situation to the case at bar in that it was a tax case involving importation of glass. The statute involved therein provided in part and substance that the District Attorney may obtain an order of Court requiring the importer to produce the invoice of the imported goods, and that if not produced that such failure of production will warrant the Court in proceeding to take as confessed the allegations which such order affirmed (on the authority of the District Attorney) would be disclosed by such production.

In that case say the Court:

"... As the question raised is not only an important one in the determination of the present case, but is a very grave question of constitutional law, involving the personal security, the privileges, and immunities of the citizens, we will set forth the order at large.
.... (p. 621)

The clauses of the Constitution to which it is contended that class of laws are repugnant are the Fourth and Fifth Amendments. ... (speaking of said Act requiring the production of said invoice, further says the Court) ...; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. And this is (p. 622) tantamount to compelling their production;...

It is true that certain aggravating incidents of actual search and seizure, such as forcibly entering into a man's house and searching amongst his papers are wanting, and to that extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplished the substantial objection of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is the natural ingredients, and affects the sole object and purpose of search and seizure. ..."

The statutes involved in the cause at bar are far harsher than that in *Boyd v. United States*, *supra*, in the severity of the consequences which their purported presumptions cast upon a person. The latter only may result in imposing a heavier tax, forfeiture or somewhat minor offense; while the former may result in a \$2,000. fine, or five years imprisonment, or both; that imposed upon appellant by said unconstitutional violation of the 4th and 5th Amendments enforced by the statutes involved herein. Such violation unquestionably forced the jury to finding appellant guilty. It is a travesty on American justice to contend that appellant had a fair and impartial trial, before an impartial jury, required by the 6th Amendment. Such violation of the 4th and 5th Amendments, unquestionably transformed the jury into a partial jury. The supervisory powers of this Honorable Court over the administration of criminal justice in the subordinate Courts warrants reversal herein.

In *Clawans v. Rives*, 70 App. D. C. 107, 104 F. 2d 240, that Court adopted a holding of this Court in 131 U. S. 184-5 that:

"In the present case, the sentence given was beyond the jurisdiction of the Court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

In *Byars v. United States*, 273 U. S. at 28 say this Court:

"...the courts must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' *Boyd v. United States*, 116 U. S. 616; *Gould v. United States*, *supra*, p. 304 (65 L. ed. 650, 41 Sup. Ct. Rep. 261). . . ."

Note that *Boyd v. United States* is extensively quoted from somewhat above.

In *Glasser v. U. S.*, 315 U. S. 60, 67, say this Court;—

"In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt. * * * p. 69) * * * The Guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. * * *

Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * *

Such duty included, obviously, the following of *Boyd v. U. S.*, *supra*, in striking down the violation of the 4th and

5th Amdts. unlawfully embodied in the statutes herein involved; which authority has so long been followed in many instances disclosed by the Citator; and which violations in the case at bar clearly "provided the * * * impetus which swung the scales toward guilt", *Glasser v. U. S.*, *supra*.

That *Boyd v. United States*, *supra*, is applicable to the cause at bar clearly appears in 26 U. S. C. A. 2591 declaring it "unlawful * * * to transfer marihuana, except in pursuance of a written order" (described) and that sec. 2593 ordering that upon "proof that a person shall have had in his possession any marihuana and shall have failed after reasonable notice and demand by the collector, to produce the order form required by sec. 2591 to be retained by him, would be presumptive evidence of guilt" of crime * * * "and of liability for the tax * * *". Such is the type of 'evidence' of appellant's guilt, extorted by the statutes involved, was the unlawful and unconstitutional cause of the finding of guilt by the jury.

Under *Boyd v. United States*, *supra*, as well as a casual statement of the substance of the statutes involved herein, appeal potentially for a reversal herein in furtherance of the age-old prevalence of American justice of the typical type, to which the late Justice Butler, referred in *United States v. Motlow*, 10 F. 2d 657, 662, held while sitting on circuit that "abhorrence, however great, of persistent and menacing crime will not excuse transgressions in the Courts of the legal rights of the worst offenders." Of his many decisions this was made a typical part of due official proceedings in his memory.

B. An authority collaterally supporting *Boyd v. United States*, *supra*, is *United States v. Jin Fucy Moy*, 241 U. S. 394, 401, say the Court:

"* * * If we could know judicially that no opium is produced in the United States the difficulties in this case would be less, but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Sec. 1. * * * If opium is

produced in any of the States obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. *United States v. de Witt*, 9 Wall., '41 * * *. The foregoing consideration gains some additional force from the penalty imposed by Sec. 9 upon any person who violates any of the requirements of the Act. It is a fine of not more than \$2,000, or imprisonment for not more than (p. 402) 5 years, or both, in the discretion of the Court. Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large portion of the citizens who have some preparation of opium in their possession criminal, or at least *prima facie* criminal, and subject to the serious punishment made possible by Sec. 9. * * *

It is thus apparent that a very high, as well as persuasive, condition is necessary to convince this Court that Congress intended to violate the 10th Amendment in the enactment of the statutes involved herein as well as that quite persuasive evidence was necessary in all respects in the proof tending to show guilt.

C. That such evidence is wholly lacking herein, seems apparent from the fact that the statutes herein involved, Sec. 2591 making it " * * * unlawful * * * to transfer marihuana, except in pursuance of a written order * * * from to be issued in blank for that purpose by the Secretary" * * * of the Federal Treasury; and in Sec. 2593 making it " * * * unlawful for any person who is a transferee" * * *.

Applying these typical provisions to the marihuana growing in our fields in many of our States, and to the appellant who possesses it is not proven to have been obtained from any source, and must be presumed to have been from such grown marihuana. Applying such term "transferee" to appellant can thus be construed as appellant being the transferee thereof upon its severance from American soil on which it was grown in the States, or any one of them.

To hold that appellant, or any other American citizen, could not lawfully become the transferee of any product of our soil without having first obtained the order form "issued in blank for that purpose by the Secretary", would be the gravest Federal regimentation of State activities "reserved to the States respectfully or to the people" by the 10th Amendment. This is typical of many other evidence of the lack of the intent of Congress in this respect.

D. Further collateral support of *Boyd v. United States*, *supra*, bearing upon the "form to be issued in blank" of Sec. 2591, and upon "* * * having failed, after reasonable notice and demand by the Collector to produce the order form * * *" is *Burck v. Taylor*, 152 U. S. 634, 654, 14 S. Ct. 696, 38 L. ed. 578, where the court says at 654:

"* * * They had a right to rely upon the law * * *, and were not bound by any constructive notice other than those laws provide. If notice was essential to charge them, actual notice should have been given, at least in the absence of a statute providing some means of constructive notice. * * *"

This authority does not warrant that in the enactment of the statutes involved herein Congress had any intention to provide for the lawful compelling of a witness to testify, or to produce evidence, against himself in a criminal cause relative state occurrences condemned in the Fourth and Fifth Amendments as well as by this Court in *Boyd v. United States*, *supra*.

E. If the Statutes Involved herein have any constitutionality in the case at bar, which is considerably and seriously denied, with the many grave constitutional settings hereinbefore and in paragraph 4, "Questions Presented", supplemented in subsequent paragraphs hereof, attention is invited to the fact most pertinently stated in Sec. 2591 in effect that transfer of marihuana "in pursuance of a written order * * * on a form to be issued in blank for that pur-

pose by the Secretary" is not a crime and that the "reasonable notice and demand" specified in Sec. 2593 for such "order form" is an essential prerequisite to the foundation of even probable cause for belief that a crime has been committed. The record shows that no such "notice and demand" was ever made until almost two years after his first arrest followed by the first indictment, or was notice attempted until long after the second indictment and arrest herein; and that such failure negatives probable cause for each arrest, as well as each indictment. Arrest and indictment without probable cause evidenced by the notice and demand, required by said sec. 2593 is void, as are the indictments herein which disclose no such notice and failure; and each such indictment violate the 6th Amdt. by failing to "inform(ed the appellant) of the nature and cause of the accusation;" this is obviously true because reasonable production of the order form would negative violation such statutes.

In the course of the trial, Deputy Collector of the Internal Revenue Clarke testified (Tr. 45) (the left numbering 121, 122, 123) that the purported demand was written and dated April 17, 1944, which is in the form of a letter addressed to "Jack Hensley or (Housley) 2314 1st St., N. W.," the original of which is in possession of appellant's counsel and temporarily tendered to the clerk for inspection that maybe desired. The pages of the original transcript from 126 to 130 disclose that the said letter being mailed to the address above stated was the only purported notice and demand made upon appellant which was not personally served, as required by **Burck v. Taylor, supra**. This was not the type of notice which "was essential to charge them, actual notice should have been given", *Burck v. Taylor, supra*. With the lack of personal service, it cannot be reasonably said, and was not proved by evidence beyond reasonable doubt, that appellant had no required "order form". If that had been a fact, the same could have been proven by the Internal Revenue Officers that appellant had

not applied for such forms, or had previously used all such forms he had applied for and obtained. It seems significant that no such evidence was forthcoming when it was within the ability of appellee to produce the same. Considerations of the character of evidence within the ability of the Narcotic Officers to produce, leads to the inescapable conclusion that the notice and demand required by the statute has no practical utility except to violate the Constitutional rights of citizens, including the 4th and 5th Amdts., and thereby invites indolence of such officers, because the records of their office disclose who have and who have not the stated orders forms which cannot be used except by the one officially receiving same.

Nigro v. United States, 276 U. S. 332 is a five to four decision with a narcotic violation in morphine which is not produced in the United States as the product of any growth of the soil of any of the United States and considerations of *Boyd v. United States*, *supra*, were not embraced within that opinion; nor was the manner of service of the order form specified in the statutes involved herein considered in such or other cause by this Court including the manner of service of a "notice * * * essential to charge" one of crime, indicated in *Burck v. Taylor*, *supra*, considered relative to this statute involved herein.

In the case at bar appellant was denied the equal protection of the law, which is an integral part of due process of law without which no one accused of crime may be lawfully deprived of his liberty. Said equal protection was afforded the accused in criminal cause No. 69,229 U. S. v. *Sidney Foster*, a marihuana case which was disposed of on the ground that the statutory required notice and demand must be made before the accused was charged and indicted.

The other elements of the "Questions Presented" are rendered clear and definite by the provisions of the constitution which from their settings, both factually and legally; therefore they seem to require no further specific

explanations of their applicability other than those afforded by their context.

CERTIFICATE OF COUNSEL.

9. Appellant's counsel considerably certifies to this Honorable Court that this petition for rehearing embraces exceptional reasons for the granting thereof which are of merit and substance in furtherance of the clarification of the law, and of public confidence in the administration of the law, and that same is presented in good faith and not for delay.

CONCLUSION.

10. The foregoing is presented to this Honorable Court by a member of long standing of its bar whose age and experience presents nothing which he does not deem worthy and meriting judicial clarification in furtherance of the law and of public confidence in its administration.

WHEREFORE, it is respectfully submitted that this petition for rehearing of this amended petition for writ of certiorari, founded only upon Constitutional settings of substance important to the public, as well as to the petitioner herein, and that the same may be granted; or at least that the same may be passed upon without prejudice to the right of the accused to independently hereof have determination of the rights hereinbefore stated, and other constitutional questions, in duly seeking relief from any and all such claimed deprivations of his liberty in and incident to the proceedings in this cause.

IRA CHASE KOEHNE,
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